IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS AMARILLO DIVISION

LINARD EARL MUCKELROY,	§	
	§	
Petitioner,	§	
	§	
v.	§	2:05-CV-0309
	§	
DOUGLAS DRETKE, Director,	§	
Texas Department of Criminal	§	
Justice, Institutional Division,	§	
	§	
Respondent.	§	

REPORT AND RECOMMENDATION TO DISMISS PETITION FOR A WRIT OF HABEAS CORPUS

Came this day for consideration the Petition for a Writ of Habeas Corpus by a Person in State Custody filed by petitioner LINERD EARL MUCKELROY on October 13, 2005. ¹ By his habeas application, petitioner does not challenge his underlying conviction or sentence, but challenges the manner in which his sentence is being calculated, specifically, petitioner complains he has not received credit for time spent on mandatory supervision. The proper method for challenging the manner in which a sentence is being calculated is by way of a petition for habeas corpus under 28 U.S.C. §2241. Since it is clear petitioner MUCKELROY is not challenging his conviction, this habeas application will be determined pursuant to 28 U.S.C. §2241.

Respondent filed an Answer on April 19, 2006 wherein he fully and accurately briefed the issue of limitations and procedural bar. Respondent is correct in his conclusion that the

¹See Spotville v. Cain, 149 F.3d 374, 376-78 (5th Cir. 1998) (a prisoner's federal habeas corpus petition is deemed filed when he delivers the petition to prison officials for mailing to the district court).

petitioner's habeas application is both time barred and procedurally barred.²

For the reasons stated by respondent in his Answer, it is the opinion of the undersigned United States Magistrate Judge that petitioner's application for a writ of habeas corpus should be DISMISSED.

RECOMMENDATION

For the reasons set forth in respondent's April 19, 2006 Answer, it is the RECOMMENDATION of the United States Magistrate Judge to the United States District Judge that the petition for a writ of habeas corpus filed by petitioner LINARD EARL MUCKELROY be DISMISSED.

INSTRUCTIONS FOR SERVICE

The United States District Clerk is directed to send a file-marked copy of this Report and Recommendation to petitioner by the most efficient means available.

IT IS SO RECOMMENDED.

ENTERED this 21st day of April 2006.

CLINTON E, AVERITTE

UNITED STATES MAGISTRATE JUDGE

* NOTICE OF RIGHT TO OBJECT *

Any party may object to these proposed findings, conclusions and recommendation. In the event a party wishes to object, they are hereby NOTIFIED that the deadline for filing objections is eleven (11) days from the date of filing as indicated by the file mark on the first

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²Respondent has also argued petitioner is not entitled to relief because he does not meet the requirements of Texas Government Code § 508.283(c). However, because the Court has determined petitioner is time barred and procedurally barred, it will not address this argument.

page of this recommendation. Service is complete upon mailing, Fed. R. Civ. P. 5(b), <u>and</u> the parties are allowed a 3-day service by mail extension, Fed. R. Civ. P. 6(e). Therefore, any objections must be <u>filed</u> on or before the fourteenth (14th) day after this recommendation is **filed**. See 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b); R. 4(a)(1) of Miscellaneous Order No. 6, as authorized by Local Rule 3.1, Local Rules of the United States District Courts for the Northern District of Texas.

Any such objections shall be made in a written pleading entitled "Objections to the Report and Recommendation." Objecting parties shall file the written objections with the United States District Clerk and serve a copy of such objections on all other parties. A party's failure to timely file written objections to the proposed findings, conclusions, and recommendation contained in this report shall bar an aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings, legal conclusions, and recommendation set forth by the Magistrate Judge in this report and accepted by the district court. See Douglass v. United Services Auto. Ass'n, 79 F.3d 1415, 1428-29 (5th Cir. 1996); Rodriguez v. Bowen, 857 F.2d 275, 276-77 (5th Cir. 1988).